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IN THE

Supreme Court of the United States

ANDREW J. ORKIN, F. MARK ORKIN
and SARAH-ROSE JOSEPHA ADLER,

Petitioners,

v.

ELIZABETH TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CENTER FOR HOLOCAUST AND GENOCIDE STUDIES AND THE HOLOCAUST RESTITUTION CLAIMS PRACTICUM OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The **Center for Holocaust and Genocide Studies** at the University of Minnesota ("the Center") is a leading resource for information, scholarly study, and teaching about the Holocaust and contemporary aspects of genocide. The Center is an independent center at the University of Minnesota, established in 1997, and administered through its history department. The issue of Holocaust-era looted art has been one of the Center's concerns and areas of expertise. The Center also has one of the largest web sites in the world (http://www.chgs.umn.edu) related to art and the Holocaust, which was visited approximately 15 million times last year alone.

The Director of the Center, Dr. Stephen Feinstein, has particular expertise in the Holocaust, including the issues of art and the Holocaust, having written extensively and taught in this area. Additionally, Dr. Feinstein served on a National Endowment for the Humanities Review panel that reviewed, among other films, the newly-released documentary *The Rape of Europa* (2007), the most comprehensive documentary about the looting of art by the Nazis, and the efforts by the United States government and the allies immediately after World War II, and still ongoing, to restitute art to its rightful owners.

The **Holocaust Restitution Claims Practicum** of the Benjamin N. Cardozo School of Law ("the Practicum") was founded in 2000 by Dr. Lucille A. Roussin, a lawyer and art historian. The Practicum provides *pro bono* legal assistance, under the supervision of Dr. Roussin, to various agencies and

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[1] Pursuant to this Court's Rule 37 subd. 2.(a), all parties have consented to the filing of this brief by the *amici curiae*. Letters evidencing such consent are being filed with the Clerk of the Court with this brief. Pursuant to this Court's Rule 37 subd. 6, *amici* confirm that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members and their counsel, made a monetary contribution to the preparation or submission of this brief.

law firms that represent Holocaust victims. Dr. Roussin teaches a seminar for the Practicum's students, entitled "Remedies for War Time Confiscation," which examines the historical and legal framework of the restitution process. The Practicum is the only program of its kind at an American law school. Dr. Roussin is also in private practice.

Amici are interested in the instant litigation because its resolution by American courts will have a significant impact worldwide on the ongoing efforts to restitute Nazi-era looted art. *Amici* are concerned that the summary dismissal of the petitioners' well-founded and well-pleaded claims by the courts below on statute of limitations grounds, if allowed to stand, will have a chilling effect on the outcome of future and current unresolved claims involving Holocaust-era looted art. It is imperative that the law reasonably reflect the difficulties in establishing provenance of artworks looted during times of war, and especially during the Second World War.

Historically, the Holocaust represents the most extreme example of pillage of property that has been a prelude to almost every genocide. *Amici*'s involvement in this case is rooted in their conviction that the restitution of Nazi-looted property to its rightful owners is an integral part of efforts to ensure that the law does not sanction genocide and pillage.

Amici therefore urge the Supreme Court of the United States to grant the petition for *certiorari* in this case.

SUMMARY OF THE ARGUMENT

1. The decisions of the federal courts below, which determined at the preliminary stage of a motion to dismiss, without a hearing, that the petitioners' claim was time-barred under California law, run directly counter to the express, consistently affirmed and continuing foreign and domestic public policy of the United States government to have Nazi-era looted art claims decided on their merits and to have such art returned to its rightful owners.

2. In light of this policy, and pursuant to this Court's ruling in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), a summary application of the California statute of limitations by the federal courts below interferes with the foreign and domestic policy of the United States with respect to Nazi-looted art, with the consequence that the state statute is pre-empted in these circumstances.

3. The courts below also erred in their determination of state law. In applying a supposed California strict doctrine of constructive notice in the circumstances of this case, the District Court and the Ninth Circuit overlooked a more recent on-point holding of the California Supreme Court in *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, (2005), which articulated a "delayed discovery rule" applicable when reasonable investigation could not have led to earlier discovery of the plaintiff's claim. In contravention of California authority, the Ninth Circuit completely failed to consider whether petitioners could reasonably have discovered their cause of action earlier. Such failure to ascertain and apply correct state law is itself grounds for granting the writ.

4. In the context of Nazi-looted art, statutes of limitations must be balanced with equitable principles such as *nemo dat qui non habet*, that require possessors of such art to establish due diligence and clean hands. The courts below failed to consider salient facts with respect to these factors raised by the petitioners. This approach, if allowed to stand, will essentially entrench the inevitability of adverse possession with respect to stolen art. This cannot be correct.

ARGUMENT

1. THE DECISIONS OF THE COURTS BELOW IN THIS CASE RUN COUNTER TO THE CONSISTENTLY AFFIRMED PUBLIC POLICY OF THE UNITED STATES GOVERNMENT TO RETURN NAZI-LOOTED ART TO ITS RIGHTFUL OWNERS.

The pernicious result created by the decision of the District Court and affirmed by the Ninth Circuit is that a family whose artwork was stolen by the Nazis cannot be permitted to present evidence showing that it is legally entitled to claim such art. Moreover, the family is not even allowed to show that it made reasonable efforts to investigate their cause of action before bringing suit. Rather, according to the courts below, the family's claim can be summarily dismissed on statute of limitations grounds by a motion to dismiss, with the court simply concluding from the pleadings alone that the family should have earlier discovered the existence of their claim. The family is not given the opportunity to rebut this finding by showing either (1) that they could not have been reasonably aware of their claim, or (2) that the defendant possessor misled the claimants by her representations about the provenance of the artwork. Rather, on a motion to dismiss, and without regard to the facts alleged in the complaint concerning the reasonableness of any delay, the court can decide that the claim is conclusively time-barred.

Such a result is contrary to the consistent and expressed foreign and domestic policy of the United States to have Nazi-era looted art claims decided on their merits and to have such art returned to its rightful owners.[2]

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[2] *See* U.S. Department of State website, "Holocaust issues":

> The Office of the Special Envoy for Holocaust Issues *develops and implements U.S. policy with respect to the return of Holocaust-era assets to their rightful owners,*

(Cont'd)

The United States government has played a leading role in efforts to restitute Nazi-era looted art to the Jewish families or their heirs. Ambassador J. Christian Kennedy, the current U.S. State Department's Special Envoy on Holocaust Issues recently explained: "The United States was spared the ravages of the war, but as one of the Allied Powers it had a major role in returning artworks found in salt mines and other places of safekeeping after the war."[3]

This effort started in 1945 with the creation of Allied Forces' Monuments, Fine Arts and Archives section and its elite cadre (the so-called "Monuments Men") charged with locating and returning the art works to the countries from which the Nazis had stolen them.

Critical to the restitution effort was the promulgation of Military Government Law No. 59, enacted in 1947 in the American zone and similarly enacted in the British and French zones of occupation. Under this law all transfers of property

(Cont'd)

> compensation for wrongs committed during the Holocaust, and Holocaust remembrance . . . *This is an important issue in our bilateral relations with countries of central and eastern Europe and with the state of Israel.*

(Emphases added), *available at* http://www.state.gov/p/eur/rt/hlcst/ (last visited September 18, 2007).

See also Testimony of the Honorable Stuart Eizenstat, Under Secretary for Economic Affairs, U.S. Department of State before the U.S. Senate Foreign Relations Committee, April 5, 2000: "Our policy on Holocaust issues also serves important U.S. foreign policy interests . . ." *available at* http://www.usembassy-israel.org.il/publish/press/treasure/archive/2000/april/dt20407.htm (last visited September 18, 2007).

[3] J. Christian Kennedy, "The Role of the United States Government in Art Restitution," Address in Potsdam, Germany, April 23, 2007, *available at* www.state.gov/p/eur/rls/rm/83392.htm (last visited September 18, 2007).

after 1933 were presumed to be confiscations. Article 1 of MGL 59 states that "It shall be the purpose of this law to effect to the largest extent possible the speedy restitution of identifiable property . . . to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945."

While the immediate post-war efforts to locate, sort, identify and return Nazi-era looted artworks were partially successful, many stolen artworks were not restituted. According to Ambassador Kennedy, "[w]ith some important exceptions it was not until the collapse of communism [in the 1990's] that a serious effort commenced to identify artworks that still had not been returned to rightful owners." (Kennedy address, *supra* n.3)

The United States again took the lead in these post-Cold War efforts to seek justice for Holocaust victims. In 1998, Congress asserted its jurisdiction over Holocaust restitution issues by enacting three laws: (1) the Holocaust Victims Redress Act, Pub.L. 105-158, 112 Stat. 15; (2) the Nazi War Crimes Disclosure Act, Pub. L. 105-567, 114 Stat. 2865; and (3) and the United States Holocaust Assets Commission Act, Pub. L. 105-186, 112 Stat. 611. In the Holocaust Victims Redress Act, Congress expressly affirmed its policy that "the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust" (§ 201(5)). Section 202 of the Act provides:

> [A]ll governments should undertake good faith efforts to facilitate the *return of private and public property, such as works of art, to the rightful owners* in cases where assets were confiscated from the claimants during the period of Nazi rule and there is *reasonable proof that the claimant is the rightful owner*. (emphases added)

In 1998, the U.S. Department of State organized the Washington Conference on Nazi-Looted Assets, and looted art was a major focus of this conference. At the behest of the United

States, forty-four nations adopted the so-called Washington Conference Principles on Nazi-Confiscated Art (the "Washington Principles"). Ambassador Kennedy explained the straightforward goal of this U.S.-led initiative: "The Washington Principles are based on the simple premise that artworks displaced during the 1933-1945 period should be returned to rightful owners" (Kennedy address, *supra* n.3). The Principles thus expressly encourage "[p]re-war owners and their heirs...to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted" (Principle 7), and recognize the challenges that have delayed such efforts, by affirming that "[i]n establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era" (Principle 4).[4] Support for the Washington Principles remains a central element of U.S. foreign policy.[5]

The Picasso forfeiture case in California and the Schiele forfeiture case in New York are emblematic of the considerable efforts undertaken by U.S. federal officials to enforce the policy of restituting Nazi-era looted art to their rightful owners.

In 2000, the United States Attorney's Office in New York filed a civil forfeiture action under the National Stolen Property Act, 18 U.S.C. 2314 ("NSPA") to seize the painting by Egon Schiele, *Portrait of Wally*, which had been displayed in a Schiele exhibition at the Museum of Modern Art, on loan from the

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[4] Washington Conference Principles On Nazi-Confiscated Art, Released in connection with the Washington Conference on Holocaust-Era Assets, Washington, DC, December 3, 1998, *available at* http://www.state.gov/www/regions/eur/981203_heac_art_ princ.html (last visited September 18, 2007).

[5] U.S. Department of State website, "Holocaust Issues", *available at* http://www.state.gov/p/eur/rt/hlcst/c10071.htm (last visited September 18, 2007).

Rudolph Leopold Collection in Vienna, Austria. *See United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445, 2002 WL 553534 (S.D.N.Y. 2002) and 105 F.Supp. 2d 288 (S.D.N.Y. 2000). The U.S. Government will turn over the painting to its proper owner only after a trial is held to determine on the merits which competing claimant is the rightful owner of the painting.

In 2004, the United States Attorney's Office in Los Angeles filed a civil forfeiture proceeding to seize a Picasso painting, *La Femme en Blanc*, in the possession of a private owner in Chicago. *See U.S. v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso*, 362 F.Supp.2d 1175 (C.D.Cal. 2005). Thomas Bennigson, the grandson of the pre-war Jewish owner, commenced parallel legal proceedings in California against the current possessor of the painting, Marilyn Alsdorf, alleging that *La Femme en Blanc* was stolen by the Nazis from his grandmother. In the forfeiture proceeding, commenced after Alsdorf transported the painting from Los Angeles to Chicago after learning of Bennigson's California suit, the U.S. government argued that the painting was transported across state lines in violation of the NSPA. The seizure action was dropped after the parties settled the litigation.

The U.S. federal government today remains committed to seeing Nazi-era looted art returned to rightful owners. Ambassador Kennedy recently set out how Nazi-era looted art claims should be resolved. He explained that the United States seeks to have cases of Nazi-era looted art decided on the "circumstances under which the artwork in question moved from one holder to another during the turmoil that prevailed in Europe during the Nazi era and the immediate postwar period" rather than on "legal arguments that frequently deal solely with procedural issues" (Kennedy address, *supra*).

The decisions of the District Court and the Ninth Circuit below in the instant litigation are directly in opposition to the policy of the federal government, by allowing claims for the return of Nazi-looted art to be summarily dismissed on statute of limitations grounds.

2. WITH RESPECT TO NAZI-LOOTED ART, THE CALIFORNIA STATUTE OF LIMITATIONS IS PREEMPTED BY THE DOMESTIC POLICY OF THE UNITED STATES THAT SUCH ART BE RESTITUTED TO THE TRUE OWNERS.

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court considered a challenge to the California Holocaust Victims Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code Ann. §§ 13800-13807, on the basis that the state statute interfered with the United States government's conduct of foreign relations. The Court concluded that the state statute was preempted. *Amici* submit that this same reasoning applies in the current case: a summary application of the California statute of limitations by the federal courts below interferes with the consistently affirmed domestic policy of the United States with respect to Nazi-looted art, with the consequence that the state statute is preempted in these circumstances.

The conclusions articulated by this Court in *Garamendi* apply in respect of Nazi looted art that is now held by United States residents and located within our borders. First, this is a matter well within the Executive's responsibility for foreign affairs. Moreover, with respect to Nazi-looted art, the Executive's responsibility is also rooted in the Constitution's Commerce Clause, which gives the federal government power to regulate interstate and foreign commerce. In the current case, as in many cases arising in U.S. courts concerning works of art in which there is evidence of Nazi coercion-tainted provenance, the painting was transported by the respondent across state lines (interstate commerce), after having entered the United States from abroad (foreign commerce).

Second, as in *Garamendi*, the United States Government has articulated and followed a particular policy. In *Garamendi*, this policy "to encourage European governments and companies to volunteer settlement funds in preference to litigation or

coercive sanctions" (539 U.S. 396 at 421) was expressed principally in the executive agreements with Germany, Austria and France, in addition to the pronouncements of state officials. In the current case, the federal policy is expressed, *inter alia*, in Acts of Congress, the Washington Principles adopted at the behest of the United States following the international Washington Conference organized by the U.S. Department of State, actions of the United States Attorney's Office, and consistent pronouncements of state officials.

It is thus evident that with respect to credible Nazi-looted art claims, the federal policy has been to resolve such claims on their merits, rather than by resort to procedural devices such as the statute of limitations. The state law as applied by the federal courts below is therefore in "clear conflict" with federal policy concerning the restitution of Nazi looted art, and pursuant to *Garamendi* the California statute of limitations cannot be applied so as to defeat federal policy concerning the restitution of such art to its rightful owners.

3. THE NINTH CIRCUIT FAILED TO FOLLOW CALIFORNIA STATE LAW WITH RESPECT TO STATUTES OF LIMITATIONS APPLICABLE IN THE CIRCUMSTANCES OF THIS CASE.

In a diversity case such as this, federal courts are required to follow and apply the law as articulated by state courts, and failure to do so constitutes a ground for granting *certiorari*. *See Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas*, 488 U.S. 920 (1988); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *Six Companies of California v. Highway District*, 311 U.S. 180, 188 (1940). Moreover, in a diversity case, "it is the duty of the [federal court] in every case to ascertain from all the available data what the state law is and apply it." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). When a federal court fails to follow state law, *certiorari* may be granted on this question alone (*Six Companies, supra* at 185: "We granted *certiorari* limited to the question whether there

was error in that ruling [of the federal Circuit Court of Appeal in refusing to follow a state Court of Appeal decision]").

In the instant case, the Ninth Circuit correctly understood its obligation to ascertain state law: "If the state's highest appellate court has not decided the question presented, then we must predict how the state's highest court would decide the question. In doing so, we take state law as it exists without speculating as to future changes in the law" *Orkin v. Taylor*, 487 F.3d 734 at 741 (9th Cir.2007). However, the federal court's prediction of how the California Supreme Court would have ruled on the issue of statute of limitations in this case was patently incorrect. In applying a strict reading of *Jolly v. Eli Lilly & Co.* 44 Cal.3d 1103 (1988) to the circumstances of the current case, the Ninth Circuit clearly erred in its determination of state law, by overlooking the directly on-point and more recent holding of the Supreme Court of California in *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, 110 P.3d 914 (2005).[6]

In *Fox*, the Supreme Court of California considered a motion to dismiss (demurrer) raising a statute of limitations defense – precisely the same procedural route as was employed in the present case. The court in *Fox* reviewed its previous decisions with respect to statutes of limitations, including *Jolly*, and articulated a "delayed discovery rule" applicable when reasonable investigation by the plaintiff could not have led to earlier discovery:

> We conclude that, under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, *unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a*

[6] Further authority for the salience of the principle of delayed accrual announced in *Fox* appears recently in *E-Fab, Inc. v. Accountants, Inc. Services*, 153 Cal. App. 4th 1308, 1323 (2007).

> *factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis.* (35 Cal.4th at 803, emphasis added)

The *Fox* decision further sets out the burden to be placed upon the plaintiff who invokes the delayed discovery rule:

> Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury . . . In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period. (35 Cal.4th at 808-809).

The Ninth Circuit's strict application in the present case of *Jolly*'s principle of constructive notice, without taking account of the subsequently-decided *Fox* decision, is clearly inconsistent with the delayed discovery rule set out in *Fox*. The Ninth Circuit said that "[i]n assessing California law, we conclude that it is highly unlikely that the California Supreme Court would abandon the *Jolly* rule, much less adopt a new rule that eschewed the concept of constructive notice" (487 F.3d at 741). Yet it is apparent that in *Fox*, the Supreme Court of California did eschew a strict conception of constructive notice, by articulating the delayed discovery rule.

Contrary to the requirements of *Fox* – and without even considering what the "reasonable investigation" described in *Fox* would have included in the circumstances of this case – the Ninth Circuit concluded that "[e]ven under the most generous

possible rule for accrual of causes of action, the claims expired in or before 1993 – three years after the last public announcement of Taylor's ownership" (487 F.3d at 742). The courts below thus concluded that a claim against respondent Taylor was time-barred solely because her ownership of the Van Gogh painting had been publicly announced, once in 1963 when she purchased the painting and again in 1990 when she unsuccessfully attempted to sell it (487 F.3d at 741-742).

In this analysis, the Ninth Circuit erroneously concluded that merely because the claimants had constructive notice of the identity of the potential defendant, the claimants necessarily had the notice of all elements of their cause of action required to trigger the commencement of the statute of limitations. As the California Supreme Court confirmed in *Fox*, "ignorance of the identity of the defendant does not delay accrual of a cause of action, but that ignorance of a generic element of the cause of action does" (35 Cal.4th at 813). One "generic element" was described by the court in *Fox* as "wrongdoing" (35 Cal.4th at 807). Furthermore, as was affirmed in *Fox*, a "plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements'" (35 Cal.4th at 807, *quoting Norgart v. Upjohn Co.*, 21 Cal.4th 383 at 398 (1999) *citing Jolly*, *supra* at 1110). A cause of action will only accrue for statute of limitations purposes when such "inquiry notice" of the elements of the cause of action can be reasonably ascribed to the claimant: "[P]laintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation" (*Fox*, *supra*, 35 Cal.4th at 808).

It is evident that the Ninth Circuit, like the District Court, completely failed to consider whether petitioners in fact could reasonably have discovered their cause of action years earlier. Neither court stopped to consider what would constitute a "reasonable investigation" in the circumstances of the heirs of

a Holocaust-era refugee, or what such reasonable investigation would have disclosed at an earlier time with respect to the key elements of petitioners' cause of action.

The Ninth Circuit recognized that it was required to "assume, for the purposes of our discussion, that the allegations of the complaint are true and that Mauthner was coerced into giving up the painting before she left Germany." *Orkin v. Taylor*, *supra*, 487 F.3d at 738. However, the court did not consider, as *Fox* required, whether the petitioners' cause of action would have been revealed by a reasonable investigation, at the time when Taylor's possession of the painting was publicly announced. Indeed, petitioners' complaint alleged facts amply supporting the conclusion of delayed accrual, by demonstrating their requisite "inability to have discovered the necessary information earlier despite reasonable diligence" (*Fox*, *supra*, 35 Cal.4th at 815).

Petitioners alleged that the grossly misleading information of the painting's provenance published in the ostensibly authoritative information provided by Sotheby's, Christie's and Taylor in 1963 and 1990 would not have revealed the true facts. Petitioners pleaded that those persons who might have had first-hand knowledge of the exact circumstances under which the painting was lost were unavailable when the painting surfaced in 1963. Mauthner died in 1947 at the age of 84, and her son-in-law and immediate heir died in 1964 in South Africa at the age of 86 after a long illness. Yet the courts below summarily assumed that an aged heir, living on another continent and ill, had reasonable notice of his claim when Taylor purchased the painting in 1963 in London.

Moreover, as noted in the petitioners' complaint, the sales brochure produced by Sotheby's for this 1963 auction was materially misleading with respect to the painting's provenance during the period between 1928 and 1945. Thus, according to petitioners' allegations, any reasonable investigation by them in 1963, or in the following years, could not have revealed the

elements of their cause of action against Taylor. Furthermore, as pleaded by the petitioners, the critical 1963 misinformation concerning the painting's provenance during the 1928-1945 period was not corrected. Rather, it was reproduced and further entrenched by Taylor and her agent, Christie's, when Taylor's possession received publicity in 1990. *See* Petitioners' original complaint as amended October 13, 2004, paragraphs 10-30 and 100; Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, January 31, 2005, page 18; Brief of Appellants before the Ninth Circuit, pages 16-17, 27.

Instead of assuming the facts as alleged by petitioners to be true and then applying the law of delayed accrual to these facts – as required by the California Supreme Court in *Fox* – the Ninth Circuit erroneously concluded that constructive notice of the identity of the possessor was sufficient to bar the claim in its entirety. In so doing, the court denied the petitioners the opportunity to present evidence that any reasonable investigation could not have revealed their cause of action at an earlier time.[7] The Ninth Circuit thus impermissibly failed to apply the current law of the State of California, as clearly articulated in *Fox*.

Amici emphasize that the facts of this case amply illustrate the complex challenges inherent in establishing the provenance of art works between 1933 and 1945; extraordinary international efforts, good fortune, expertise and considerable resources are required for claimants to discover and substantiate the existence of claims. There is no established test for how "provenance" is defined, what materials constitute "authoritative" provenance,

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[7] In the event that the courts below felt that the Petitioners did not sufficiently plead the reasonable non-discoverability of the claim, it ought to have permitted Petitioners, pursuant to California law as confirmed in *Fox*, to file an amended complaint to plead such facts more particularly rather than granting the motion to dismiss. ("[I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility [that the] defect...can be cured by amendment." *Fox*, *supra* at 810, *quoting Aubry v. Tri-City Hospital Dist.*, 2 Cal.4th 962, 967 (1992)).

how gaps in such information should be treated, or how the available information should be interpreted or presented, and errors are frequent and easily compounded. *See* Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle Univ. L.R. 631, 688-690 (2000). These challenges are further exacerbated by concealment and falsification of records that have been prevalent in the art market, particularly during WWII and in the post-Holocaust era. For example, as noted by this Court in *Republic of Austria v. Altmann*, 541 U.S. 677, 681-685 (2004), Maria Altmann only became aware of the key elements supporting her cause of action when Austrian archives were opened to private researchers in 1998 and a journalist discovered that the Museum had in previous decades attempted to conceal the details of its acquisition of the Klimt paintings.

The lower courts in this case completely ignored the real-world complexity of claims concerning Nazi-looted art, and California state law as articulated in *Fox*, when they summarily concluded – without any factual inquiry – that the petitioners "reasonably could have discovered, through investigation of sources open to them, their claim to and the whereabouts of the Van Gogh painting." *Orkin v. Taylor*, *supra*, 487 F.3d at 741. This error alone constitutes a recognized ground for granting *certiorari*.

4. IN THE CONTEXT OF NAZI-LOOTED ART, STATUTES OF LIMITATION MUST BE BALANCED AND RECONCILED WITH THE PRINCIPLE OF *NEMO DAT*, INCLUDING BY REQUIRING POSSESSORS TO ESTABLISH DUE DILIGENCE AND CLEAN HANDS.

Amici are deeply concerned that the decisions of the courts below granting the motion to dismiss brought by the respondent could set a very disturbing precedent with respect to both Nazi looted and other art stolen in zones of conflict that may be trafficked in the United States and abroad. The courts below

concluded that petitioners' claim was time-barred without considering the challenges of establishing provenance of art stolen during the Nazi period and the difficulties introduced by the widespread post-war practices of museums, dealers and private collectors to launder such art even in the face of questionable provenances. *See Menzel v. List*, 298 N.Y.S. 2d 979 (1969); *Rosenberg v. Seattle Museum*, 124 F. Supp.2d 1207 (W.D. Wash. 2000). All of these factors are amply raised by the claim presented by the petitioners, whose allegations must be deemed true at this stage of the proceedings.

The lower courts ignored all of these salient facts: the indifferent manner in which respondent bought the painting at Sotheby's in 1963; her constructive notice of the painting's status as Nazi looted art; her corresponding failure to take appropriate due diligence precautions against acquiring such art; the expertise of respondent's father, a professional art dealer who acted as her legal agent for the purchase in 1963; and respondent's own unclean hands in disseminating material misinformation concerning the painting's provenance, through the sales brochure produced by her agent Christie's in 1990.

In the case of art stolen during a time of war or genocide, the established principle of Anglo-American common law, *nemo dat qui non habet*, forms the legal expression of our moral belief that pillaging and theft should not be tolerated, much less rewarded. The passage of time should not dilute this principle, as unjust enrichment should have no statute of limitations when the victim could not and did not know of the facts constituting the injustice. The contrary approach – and the one at least implicitly adopted by the courts below in this case – essentially entrenches the inevitability of adverse possession with respect to stolen art. This cannot be correct.

CONCLUSION

For all of the above reasons, the petition for a writ of *certiorari* should be granted.

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Respectfully submitted,

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